**ASIA INSURANCE CO. LTD.**

**v.**

**TAT HONG PLANT LEASING PTE. LTD.**

HIGH COURT, SINGAPORE
S. RAJENDRAN J
[SUIT NO. 4218 OF 1986]
30 OCTOBER 1991

***INSURANCE:*** *Contract uberrima fides - Effect of misrepresentation and non-disclosure of material facts - Difference between materiality and material facts - Obligation to disclose despite absence of proposal form - Subrogation - Whether policy can be avoided due to non-disclosure - Whether payment made can be recovered on the ground of mistake of fact.*

On 5 April 1984, the plaintiffs contracted with the defendants to insure a specific crane against loss or damage. In the policy of insurance, the person insured was stated to be the defendants "and/or hirer". By an endorsement dated 16 April 1984, the insured was stated to be "Citibank N.A. as owner" and the defendants "as the hirer".

On 27 March 1984, the defendants had already leased the crane to a third party, Shinei. Whilst a standard form of lease agreement was used by the parties, by a side letter it was stated that the defendants (as lessor) shall be responsible for all repairs and maintenance and shall take up all insurances. This side letter is a special arrangement as under the standard form of lease agreement used by the defendants, the responsibility for repairs, maintenance, damages, losses and arranging insurance cover is always with the lessee.

On 22 June 1984, whilst the crane was under hire to Shinei, it was damaged. After the surveyors and adjusters had examined the damage, the plaintiffs paid the defendants $78,287.35 in satisfaction of the defendants' claim under the policy. Thereafter, through subrogation rights, the plaintiffs proceeded (in the name of the defendants) against Shinei. It was then that the plaintiffs discovered the special terms of the lease agreement between the defendants and Shinei, and accordingly the plaintiffs discontinued their action.

The plaintiffs then filed this action against the defendants, seeking a declaration that they were and have at all times been entitled to avoid the policy on the ground of non-disclosure of the side letter between the defendants and Shinei. They also asked for the return of the money paid to the defendants as money paid under a mistake of fact.

The issue before the Court was whether the defendants' failure to disclose the contents of the side letter can be said to be a non-disclosure of a material fact.

**Held:**

**[1]** An insurance contract is a contract *uberrima fides*. As such it can be avoided for misrepresentation as well as for non-disclosure of material facts. The obligation to disclose material facts arises regardless of whether the assured has been asked to complete a proposal form or had been asked any other questions by the insurer.

**[2]** The assured is required to disclose all facts within his knowledge which would affect the mind of a prudent and experienced underwriter in determining whether he will take the risk and if so, at what premium and on what conditions.

**[3]** In the instant case, the defendants failed to disclose the contents of the side letter with Shinei to the plaintiffs. The right of subrogation is a valuable right to an insurer and any contract which extinguishes this right would be material to the insurer.

**[4]** When the terms of the contract have been reduced by the parties to the form of a document, the parties are precluded from adducing evidence which contradict or is at variance with the written document except in circumstances provided for in the Evidence Act.

*[Judgment for the plaintiffs.]*

**Case referred to:**
*Tate & Sons v. Hyslop [1885] 15 QBD 368* ***(foll)***

**Other sources referred to:**
*General Principles of Insurance Law*, Ivamy 3rd Edn., p. 122; 5th Edn. pp. 111, 133
*The Law of Insurance*, Raoul Colinvauy p. 90, paras 152, 153; 6th Edn., 1990 p. 106

*For the plaintiffs - Dara Singh; M/s. Madhavan Louis & Partners*
*For the defendants - Maurice Oon; M/s. Chua Yeo Low & Partners*

**JUDGMENT**

**S. Rajendran J:**

The defendants were at all material times in the business of leasing or hiring cranes to third parties. The standard form of lease agreement used by the defendants in hiring out their cranes included the following provisions:

Clause 2 - All repairs, maintenance, fuel and transportation costs during lease period shall be borne by the lessee.

Clause 5 - The lessee shall be responsible for all damages and losses save for fair wear and tear sustained by the machine from any cause whatsoever after the lessee has taken delivery and such damages and losses shall be made good by the lessee at their expense and rental shall continue to be payable until the lessee have made good such damages and losses. An on-hire inspection at lessor's expense and an off-hire inspection at lessee's expense will be undertaken by an independent surveyor. Any defects/deficiencies etc. constitute fair wear and tear or otherwise, will be decided by the said surveyor.

Clause 6 - The lessor leases the machine without operator. Lessee shall insure each of the machine for the value stated overleaf and the lessor shall be stated in the policy as beneficiary. In the event that the insurance company declines to pay the claims due to negligence on the part of the lessee or due to whatever reasons, the lessee shall compensate the lessor for the full value of the machine or balance thereof. The insurance policy shall be taken out on or before the commencement of this lease.

By a policy of insurance made between the plaintiffs and the defendants dated 5 April 1984, the plaintiffs contracted with the defendants to insure a specific crane against loss or damage. In the schedule to the said policy, the persons insured were stated to be: 'Tat Hong Plant Leasing Pte. Ltd. and/or Hirer'. By an endorsement dated 16 April 1984 it was agreed between the parties that the insured named in the schedule to the policy should with effect from 11 April 1984 be the following:

Citibank, N.A. as the Owner and Tat Hong Plant Leasing Pte. Ltd. as the Hirer.

On 27 March 1984 the defendants leased the crane in question to a third party, namely Shinei Engineering Pte Ltd (Shinei). The standard form of lease agreement was used but by a side letter also dated the same day the following amendments to the terms in the standard contract were agreed:

Clause 2 - Lessor shall be responsible for all repairs and maintenance. Lessee shall be responsible for fuel and transportation.

Clause 5 - Shall be deleted.

Clause 6 - The lessor leases the machine with operator. Lessor shall take up all insurances.

In effecting the policy of insurance of the crane, the defendants were not required to fill in any proposal form. According to the representative of the plaintiffs who gave evidence the defendants were such long-standing customers that the plaintiffs did not require a proposal form. The only information asked of the defendants before the policy was issued was the particulars of the machinery concerned. The plaintiff therefore had no knowledge of the specific terms under which the crane was hired out.

On 22 June 1984 whilst the crane was under hire to Shinei, the crane was damaged. As a result of a claim by the defendants under the policy, the plaintiffs engaged their surveyors and adjusters to survey and adjust the defendants' claim under the policy for repairing the said damage. The surveyors in the course of their work requested the defendants for a copy of the lease agreement between the defendants and Shinei. The defendant gave to the surveyors a copy of the lease agreement dated 27 March 1984 but did not give to the surveyor a copy of the side letter of the same date.

On 29 November 1984 the plaintiffs paid to the defendants a sum of $78,287.35 in satisfaction of the defendants' claim under the policy. By Clause 4 of the policy the plaintiffs were entitled to be subrogated in respect of any rights that the defendants may have against third parties. In pursuance of the right of subrogation, the plaintiffs commenced proceedings in the High Court (Suit No. 707 of 1985) in the name of the defendants against Shinei. It was from an affidavit filed on 5 May 1985 by Shinei in the said suit that the plaintiffs discovered, for the first time, that the terms contained in the lease agreement dated 27 March 1984 had been altered by the side letter of the same date. The plaintiffs took the view that in the light of the contents of the side letter their suit against Shinei was untenable and accordingly on 7 November 1985 they discontinued the proceedings.

By this action against the defendants the plaintiffs sought a declaration that they were and have at all material times been entitled to avoid the policy on the ground that the policy was obtained by the non-disclosure of a material fact. The alleged non-disclosure was that the defendants had not disclosed to the plaintiffs the side letter to Shinei which had extinguished the plaintiffs' right of subrogation. The plaintiff also sought the return of the sum of $78,287.35 as money paid under a mistake of fact.

In support of the plaintiffs' claim, Counsel for the plaintiffs relied on the case of *Tate & Sons v. Hyslop* [1885] 15 QBD 368. In that case the plaintiffs had an arrangement with one Hooper under which Hooper was to do all the plaintiffs' lighterage on the terms that he was only to be liable for negligence. The plaintiffs effected with the defendant a policy of marine insurance on goods which included risks on crafts and lighters and was not with no recourse against lightermen. It was held that the terms of the agreement with Hooper by which Hooper was liable only for negligence, was a fact which a prudent and experienced underwriter would take into consideration in estimating the premium, and that therefore the jury was justified in finding that the non-communication of the terms to the defendant was the concealment of a material fact which vitiated the policy.

Counsel for the defendants, submitted that as the defendants were not asked any questions by the plaintiffs the defendants were not aware that the fact that the right of salvage would be restricted was a fact that the plaintiffs would consider as material. Counsel for the

defendants submitted that in *Tate & Sons v. Hyslop* the assured knew that the underwriters considered any reduction in their salvage rights as material and in spite of that knowledge had failed to provide the information to the underwriters. Counsel also drew the Court's attention to the judgment of Brett MR in which reference was made to the fact that matters which would only minimise the underwriters' right to salvage were not material facts. The relevant part of the judgment of Brett MR was as follows:

> The fact which it is said ought to be disclosed was the plaintiffs' arrangement with Hooper, which minimised Hooper's liability in case of loss. The only effect of such an arrangement on the underwriters would be, that assuming a loss for which the underwriters would be liable on the policy to pay the plaintiffs the sum assured, they would not have the same valuable recourse over against the lighterman as they otherwise would have had but for such an arrangement. It is obvious, therefore, that it would only affect the salvage which the underwriters might have, and if the underwriters had not taken any steps in the matter which had become known to the plaintiffs, I should have thought that the existence of that which would only minimise the underwriter's right to salvage was not a material fact. It would certainly have been immaterial to the risk, and, to my mind, immaterial to the insurance. But here there was evidence that it having become more or less publicly known that some lightermen would not carry goods unless their liability was minimised, there were obviously two states of things affecting underwriters' right to salvage where there was a loss on board lighters, - one where the lighterman was liable to the full extent of the law, and the other where there was not that full liability ... The underwriters, finding that in one state of things they would have the advantage of using the assured's name against persons who were liable to the full liability, whilst in another state of things they would not have that advantage, came to the conclusion, as it seems to me, that they ran a greater risk of money loss in the one case than they did in the other, and that in the case in which the lighterman carried the goods without his full liability attaching, they would charge a larger premium than they would in the case where there was such full liability. Therefore, they resolved to have two rates of premium. If they had kept this solution in their own breasts, it would have had no effect upon the matter which is here in question, as it would only have affected salvage, and would not therefore have been material, but they made it known, and there is evidence that it was known to the plaintiffs either personally or through their brokers before they effected these policies, that in one state of things one premium would have to be paid, and in another state of things it would be a different premium. It seems to me that under these circumstances it was material that the underwriters should know what was the plaintiffs' intention with regard to the lighterage of the goods, and if their contract with Hooper bound them to employ him it certainly was material that the underwriters should know it; but even if the contract of the plaintiffs did not so bind them, yet, as there were to their knowledge different rates of premium, and they had, at the time of insuring an intention to land the goods under an arrangement which, if disclosed, would influence the underwriters in requiring the larger rate of premium, it seems to me that it became, under those circumstances, a matter which a prudent and experienced underwriter would take into consideration in estimating the premium, and that therefore, according to the definitions which have been laid down, it was a material fact to be made known to the underwriters, and the jury were justified in answering the second question in the way they did.

In support of his submission, Counsel quoted from the 3rd Edn., of Ivamy "*General Principles of Insurance Law*" where the author at p. 122 stated:

> Nor is it material that he has entered into a contract with a third person by which, in the event of the property proposed to be insured being lost or injured by such person, his right of action is restricted.

and also referred the Court to the footnote thereto where after referring to the judgment of Brett MR in *Tate v. Hyslop* it is stated:

a It is otherwise where the proposed assured knows that the insurers regard the existence of such a contract as material, and vary the rate of premium accordingly.

Counsel for the defendants chose to quote the above extracts from the 3rd Edn., of *Ivamy.* Had he looked at the latest edition (5th Edn.), he would have noted that a somewhat different approach to the decision in *Tate v. Hyslop* has been taken. At p. 133 of the 5th Edn., it is stated:

b

> Facts which show that, in the circumstances, the liability of the insurers may be greater than would naturally be expected under an insurance of the property in question, are usually material ...
>
> In the case of goods entrusted to a carrier, it may be a material fact that the assured has entered into a special contract, by which the carrier is relieved from his common law liability.

c This approach in the 5th Edn., of Ivamy is consistent with the judgment of Bowen LJ in *Tate v. Hyslop*. Bowen LJ said at p. 380 of the report:

> It is not necessary to discuss the question whether what would merely lessen the salvage is a matter which ought to be disclosed, nor to enter into the nature of the arrangement between the plaintiffs and Hooper. What I found my judgment upon is this, that at the time of effecting these policies there was an arrangement existing between the assured and Hooper, which was
> d intended by the assured to be acted upon, and which, as found by the jury, was a material fact affecting underwriters in estimating the premium.

It was submitted on behalf of the defendants that in the present case the defendants did not know that the terms of his contract with Shinei would be considered by the plaintiffs to be material since the plaintiffs, prior to the issue of the policy, had asked no question at all
e and that consequently the failure to disclose was an innocent failure. Counsel submitted that such innocent failure would be a defence to the non-disclosure and relied on the following passage from Raoul Colinvaux, "*The Law of Insurance*" at p. 90, para. 152:

> While an innocent misrepresentation affords the party misled a ground for avoiding the policy, a contrary rule applies in the case of non-disclosure. While innocence is no defence to misrepresentation, it is a defence to non-disclosure.

f I could not accept this submission. What was stated in the passage quoted cannot be taken in isolation. The "innocence" referred to is ignorance of material facts and not ignorance of materiality. In the text the passage carries a footnote referring the reader to para. 153 of the text in which it is stated:

> It is at any rate clear from the authorities that the fact that the assured did not know that
> g a fact was material is no excuse where a reasonable assured would have done so, and that mere ignorance of materiality, as opposed to ignorance of the material facts, can never excuse the assured, even though he acted in perfect good faith. It does not matter whether the omission to communicate a material fact arises from intention, or indifference, or mistake, provided the assured knew of the fact in question. What is regarded as material by the 'more experienced and intelligent insurers' carrying on the business in question at the time is what matters, and the general practice of insurers is relevant in this respect.
>
> h However, Courts, acting as juries, have in practice for many years tended to test the views of insurers by reference to the test of what a reasonable man, in the shoes of the assured, would have considered material.

Counsel did not inform the Court which edition of Colinvaux he was quoting from but if Counsel had referred to the latest edition of *Colinvaux* (6th Edn., 1990, at p. 106) he would
i have found that the passage he quoted no longer appears and instead what appears reads as follows:

> The effect of misrepresentation on the contract is precisely the same as that of non-disclosure: it affords the aggrieved party a ground for avoiding the contract.

Counsel would also have noted that in the 6th Edn., of *Colinvaux,* the views expressed on *Tate v. Hyslop* is identical to that expressed in the 5th Edn., of *Ivamy.* This appears at p. 111 under the sub-heading "Facts affecting subrogation rights" where it is stated:

> Sometimes facts affecting the subrogation rights of the insurers are material. Thus where the owner of goods makes a special contract with a carrier relieving him of all liability, such fact may affect the premium or the willingness of the insurers to take the risk in which case it must be disclosed.

An insurance contract is a contract *uberrima fides*. As such it can be avoided not only for misrepresentation of material facts but also for non-disclosure of material facts. The obligation to disclose material facts arises regardless of whether the assured has been asked to complete a proposal form or asked any other questions by the insurer. The fact that in this case the plaintiffs did not specifically ask for the terms of the lease agreement or ask for a proposal form to be completed prior to the issue of the policy does not affect the obligation on the defendants to disclose the terms of the lease agreement where those terms are material. The question that arises for consideration in this case is whether the failure of the defendants to disclose the contents of the side letter to the plaintiffs can be said to be a non-disclosure of a material fact.

What constitues a material fact that has to be disclosed has been discussed in numerous cases. It is now clearly established that the assured has to disclose all facts within his knowledge which would affect the mind of a prudent and experienced underwriter in determining whether he will take the risk and, if so, at what premium and on what conditions. As stated in Colinvaux in the passage quoted above the view of the insurers can be tested by reference to the test of what a reasonable man, in the shoes of the assured, would have considered material.

In the present case, not only did the defendants at the time of the issue of the policy not disclose to the plaintiffs the fact that they had by the side letter specifically relieved Shinei of any liability for damage caused to the crane but had failed to provide a copy of the side letter to the plaintiffs even when they were specifically asked, after the damage had occurred, for the terms of the agreement with Shinei. Such conduct indicates that the defendants were aware that the release of Shinei from any liability was a matter that was material to the plaintiffs. But even apart from that I was satisfied the release of Shinei under the side letter of any liability for damage was a fact which would affect the mind of a prudent and experienced underwriter and would have been considered material by such an underwriter. The right of subrogation is a valuable right to an insurer and any contract that extinguishes this right would be material to the insurer. In my view a reasonable man, in the shoes of the defendants would know that a contract which nullifies the right of subrogation, would be a contract that is material to the insurers.

It was submitted on behalf of the defendants that the side letter did not in fact extinguish the right of subrogation and that the only effect of the side letter was to delete Clause 5 of the lease agreement with the result that the lease agreement was silent as to whether Shinei was responsible for damages to the crane. I could not accept this submission. It was plain to me that the defendants and Shinei had agreed that Shinei was not to be liable for any damage to the crane and that was why the side letter was issued.

Counsel for the defendants also submitted that the persons insured under the policy were the defendants and/or their hirers and consequently as Shinei was a hirer the plaintiffs had no right of subrogation as against Shinei. The defendants however did not dispute that by the endorsement to the policy dated 16 April 1984 the schedule to the policy naming the insured had been amended and that by this amendment reference to the hirer was deleted. The defendants however sought to argue that in spite of this endorsement Shinei was covered under the policy since both the plaintiffs and the defendants knew that the only reason that the amendment was made was because the defendants were taking up financing from Citibank NA. I could not accept this argument. When the terms of a contract have been reduced by the parties to the form of a document, parties are precluded from adducing evidence which contradict or is at variance with the written document except in the circumstances provided for in the Evidence Act. The defendants have in this case not even attempted to bring themselves into any of these circumstances. It is accepted law that when a contract is varied it operates according to the variation and the original terms cannot be set up by one of the parties against the other. By the endorsement dated 16 April 1984 the policy covers only Citibank NA and the defendants. Shinei, the hirer from the defendants, was not covered.

Counsel for the defendants also sought to raise waiver by the plaintiffs as a further defence. This was objected to by Counsel for the plaintiffs as waiver had not been pleaded. Apart from not having been pleaded, there was no evidence before the Court on which it could be said that the plaintiffs had waived their rights to the information in question and I rejected that defence.

As the defendants had failed to disclose the side letter the defendants were in my view in breach of their duty to make full and frank disclosure of all material facts and the plaintiffs were therefore entitled to avoid the contract of insurance. Accordingly, I granted the declaration and orders sought by the plaintiffs.

Also found at [1992] 1 CLJ 330